

No. 15771

In the
United States Court of Appeals
For the Ninth Circuit

CARL BEISTLINE, *Appellant,*
vs.
CITY OF SAN DIEGO and GENERAL
DYNAMICS CORPORATION,
Appellees.

Appellant's Opening Brief

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I.

BASIS OF JURISDICTION

1. Plaintiff by his pleadings alleges that this case raises a controversy involving Section I of the 14th Amendment to the Constitution of the United States, and that the amount in controversy exceeds the sum of \$3,000.00; that is to say, plaintiff claims that his case is based upon a federal question and that the United States District Court has jurisdiction of the matter by virtue of Section 1331 of Title 28 of the United States Code. The United States District Court for the Southern District of California entered its order dismissing the complaint on the 15th day of August, 1957 on the ground that there was no sub-

stantial federal question involved. Since this was a final decision disposing of the action and this is not a matter upon which a direct review may be had in the Supreme Court of the United States, this Court has jurisdiction to review said order on appeal by virtue of Section 1291 of Title 28 of the United States Code. Although the order allowed plaintiff twenty days to amend, plaintiff did not amend but elected to stand on his pleadings and filed this appeal. The order is therefore an appealable order, *Asher v. Ruppa*, 173 F. 2d 10.

2. It is plaintiff's contention that the allegations necessary to show the existence of jurisdiction in the United States District Court are to be found in the pleadings at the following places in the record:

Paragraphs I and II of the first cause of action on page 3 of the record;

Paragraph IV of the first cause of action on page 4 of the record;

Paragraphs V, VI and VII of the first cause of action on pages 4 and 5 of the record;

Paragraphs VIII and X of the first cause of action on pages 5 and 6 of the record;

Paragraph XI of the first cause of action on page 7 of the record;

Paragraphs I and II of the second cause of action on pages 7 and 8 of the record;

Paragraph III of the second cause of action on pages 8 and 9 of the record.

II.

STATEMENT OF THE CASE

It is plaintiff's contention that the State of California acting by and through one of its sub-divisions or local agencies, the City of San Diego, and under color of authority derived from the State, to wit, the eminent domain statutes, forced the plaintiff to transfer to the said City certain real property owned by the plaintiff for an alleged public use; that, however, said property has not been put to a public use, but has been employed for a private use. Plaintiff alleges that he did not voluntarily transfer said property and would not have done so had it not been for the compulsion exercised on him by the City of San Diego. (See Paragraph XI of the first cause of action, page 7 of the record, and Paragraph II of the second cause of action, page 8 of the record.) In the meantime, since the City acquired said property from plaintiff it has greatly appreciated in value, as plaintiff expected it to do. Plaintiff further alleges that the City of San Diego never actually intended to use plaintiff's property for a public use, but was in effect speculating in real property. (Paragraph X of the first cause of action, page 6 of the record.) Plaintiff contends that by acquiring plaintiff's property in the manner indicated, the defendant, City of San Diego, took his property without due process of law in violation of Section 1 of the 14th Amendment to the Constitution of the United States, and that when the defendant, General Dynamics Corporation, acquired the said

property from the City it had knowledge of the facts, and therefore it is not an innocent purchaser for value without notice, and holds the property subject to whatever rights plaintiff has against the City of San Diego. Plaintiff prays for a return of the property, or if that is not possible, then for a judgment declaring the City of San Diego to be a trustee of the proceeds of the sale thereof for the benefit of plaintiff, or in the further alternative, a judgment for damages. Plaintiff offers to restore all consideration received by him and to do whatever is equitable in the premises.

III.

SPECIFICATION OF ERRORS

The only error specified upon this appeal by plaintiff is that the Court erred in dismissing the action for lack of jurisdiction in the United States District Court on the ground that the case did not present a substantial federal question.

IV.

ARGUMENT

Summary of Argument

Point (A). *Defendant, City of San Diego, took plaintiff's property.*

Point (B). *The act of the City is the act of the State.*

Point (C). *Plaintiff's complaint is based on the charge that defendant, City of San Diego, took plaintiff's property by means of fraud and duress for private use.*

Point (D). *The taking of private property by a State or an agency thereof for private use violates Section I of the 14th Amendment to the Constitution of the United States.*

POINT (A)

Defendant, City of San Diego, took plaintiff's property. The complaint adequately sets forth plaintiff's charge that the transfer to the City was not voluntary. (See Paragraphs V, VI and VII of the first cause of action on pages 4 and 5 of the record, Paragraph XI of the first cause of action on page 7 of the record, and Paragraphs I and II of the second cause of action on pages 7 and 8 of the record.)

Plaintiff would not part with the property prior to the instigation of condemnation proceedings. He even refused to negotiate with the City's representa-

tive concerning a possible sale. So the City commenced condemnation proceedings to compel the plaintiff to either negotiate with it with reference to price, or to allow the price to be fixed in accordance with the provisions of the eminent domain statutes of the State of California. Plaintiff had no recourse as far as the *taking* of the property was concerned. The alleged purpose of the taking, to wit, for use as a municipal airport, was a legitimate public use. (Calif. Code of Civil Procedure, Sec. 1238, Subsec. 20). He could have haggled with reference to price. But the fairness of the price as of the time of the taking is not in issue. Presumably plaintiff felt that he would have gained no substantial advantage by going through the sometimes lengthy process of having the price fixed by a jury, so he agreed to the price offered and conveyed the property to the City, assuming of course that he had no alternative but to convey.

In short, plaintiff contends that for the question with which we are here concerned there is no substantial distinction between the situation presented here and the case where the condemnation proceedings are completed and the value of the property taken is fixed by a jury. In both cases the property has been taken under compulsion of law.

POINT (B)

The act of the City is the act of the State. The City of San Diego is given its municipal powers by a charter issued by the State of California (See Paragraph II of the complaint, page 3 of the record). It is an agency of the State and derives its authority therefrom. The Fourteenth Amendment to the Constitution is directed against the states and their agencies and creatures, *Marten v. Holbrook*, 157 Fed. 716; *West Virginia State Board of Education, et al. v. Barnette, et al.*, 319 U.S. 624, 63 Sup. Ct. 1178, 87 L. Ed. 1628.

Acts done under or by authority of the laws of a state are ascribable to it, *Home Telephone & Telegraph Company v. City of Los Angeles*, 227 U.S. 278, 33 Sup. Ct. 312, 57 L. Ed. 510. The latter case was a suit to enjoin the enforcement of a municipal ordinance averred to be repugnant to the due process of law clause of the Fourteenth Amendment to the Federal Constitution. The assailed ordinance was one fixing telephone rates, and the complaint charged that the rates fixed were so unreasonably low that their enforcement would bring about the confiscation of the property of plaintiff. The defendant entered a plea to the jurisdiction of the Court on the ground that the Constitution of the State of California had a provision to the effect that no person shall be deprived of life, liberty, or property without due process of law and that the plaintiff had never invoked the aid or protection of its own state to prevent the alleged taking of its property so that, therefore, the action complained of was not actually the act of the state.

The District Court agreed with the defendant and dismissed the bill for want of power as a Federal Court to consider it. A direct appeal was taken to the Supreme Court and that Court reversed, holding that the District Court did have jurisdiction and should have entertained the bill. In its opinion the Court said:

“Here again the settled construction of the Amendment is that it presupposes the possibility of an abuse by a state officer or representative of the powers possessed, and deals with such a contingency. It provides, therefore, for a case where one who is in possession of state power uses that power to the doing of the wrongs which the Amendment forbids, even although the consummation of the wrong may not be within the powers possessed, if the commission of the wrong itself is rendered possible or is efficiently aided by the state authority lodged in the wrongdoer. That is to say, the theory of the Amendment is that where an officer or other representative of a state, in the exercise of the authority with which he is clothed, misuses the power possessed to do a wrong forbidden by the Amendment, inquiry concerning whether the state has authorized the wrong is irrelevant, and the Federal judicial power is competent to afford redress for the wrong by dealing with the officer and the result of his exertion of power.”

In further support of this point see the last paragraph of the opinion in the case of *Cuyahoga River Power Company v. City of Akron*, 240 U.S. 462, 36 Sup. Ct. 402, 60 L. Ed. 743, which opinion is set forth in its entirety under “Point D” below.

POINT (C)

Plaintiff's complaint is based on the charge that defendant, City of San Diego, took plaintiff's property by means of fraud and duress for private use. This charge is the essence, the very basis of plaintiff's complaint. In the first Count of the Complaint, plaintiff alleges the taking by means of fraud, which is surely not due process, and in the second count he alleges the taking by means of duress and the violation of a condition, implied if not actual, that the property be used for a public purpose. In any event the central theme of each Count is that the property of plaintiff was taken not for a public use, but for a private use.

This case is entirely unlike the case of *Gully v. The First National Bank in Meridian*, 299 U.S. 109, 57 Sup. Ct. 96, 81 L. Ed. 72, cited by the Court in its memorandum of decision dismissing plaintiff's complaint. It is fundamental that where there is more than one forum available for the trial of an action, the plaintiff has the right to choose the forum. Plaintiff has the right to decide whether he will rely on violation of a Congressional Act, or of a provision of the United States Constitution (*Munoz v. Porto Rico Ry. Light and Power Co.*, 83 F. 2d 262). It has been held in numerous cases that the complaint unaided by any anticipation or avoidance of defenses must show that it actually and substantially involves a controversy respecting the validity, construction, or effect of an Act of Congress (or the Constitution) upon the determination of which the result depends (*South Side*

Theatres v. United West Coast Theatres Corp., 178 F. 2d 648). In the *Gully* case, *supra*, plaintiff, the collector of taxes for the State of Mississippi, sued the defendant Bank in a Mississippi court for taxes due from another bank, which it had agreed to assume when it took over the assets of the other bank. Defendant attempted to raise a federal question *by way of answer* and had the case removed to a federal court on the ground that a federal law was involved, his theory being that because it was only by reason of a Congressional act that the State of Mississippi could tax shares of a National Bank, a federal question was necessarily involved. The Supreme Court held that this was merely a collateral or incidental involvement of a federal law and that such law was not actually the *basis of the action*, and that therefore there was no federal jurisdiction. Judge Cardozo said in effect that the mere fact that a federal question may lurk in the background is not enough to warrant removal. Quoting from Judge Cardozo's opinion,

"That there is a federal law permitting such taxation does not change the basis of the suit, which is still the statute of the state, though the federal law is evidence to prove the statute valid."

In said opinion the Court also says,

"To bring a case within the statute, a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action."

It is submitted that plaintiff's right not to have his property taken for private use is an essential element of his cause of action. Or, to put it another way, the immunity of plaintiff's property from seizure for private use is an essential element of plaintiff's cause of action.

POINT (D)

The taking of private property by a state, or an agency thereof, for private use violates Section I of the Fourteenth Amendment to the Constitution of the United States. It seems elementary that if the Federal Courts have jurisdiction to enjoin a threatened or attempted action of a state aimed at taking a person's property for private use, they would also have jurisdiction to remedy such action once it has been accomplished. It also seems that there should be no distinction between a case where a state has taken, or is attempting to take, a person's property without just compensation, and a case where a state has taken, or is attempting to take, a person's property for private use.

If the foregoing be granted, and plaintiff believes it must be, there is ample authority for the proposition stated above; that is, that the taking of private property by a state, or an agency thereof, for private use violates Section I of the Fourteenth Amendment to the Constitution of the United States, and for the further proposition that the United States District Courts have jurisdiction to try cases based upon such a charge.

The cases involved in *Mosher v. City of Phoenix*, 287 U.S. 29, 53 Sup. Ct. 67, 77 L. Ed. 148, went up to the Supreme Court by writ of certiorari from the Circuit Court of Appeals for the Ninth Circuit limited to the question of the jurisdiction of the District Court as a federal court. There was no diversity of citizenship, and jurisdiction depended upon the presentation by the bills of complaint of a substantial federal question. Chief Justice Hughes delivered the opinion of the Court, from which plaintiff quotas as follows:

“The suits were brought by petitioner as owner of parcels of land in the City of Phoenix, Arizona, to restrain the City from appropriating her land for purposes of a street improvement. The Circuit Court of Appeals, having decided in *Collins v. Phoenix*, 54 F. 2d 770 (where jurisdiction of the federal court rested on diversity of citizenship) that the proceedings of the City were not authorized by the statutes of Arizona, held in the instant cases that the petitioner, having alleged that the proceedings were void under the state law, had not presented a substantial federal question. But petitioner did not stop with allegations as to the City’s authority under state law. Petitioner also alleged, in No. 6, after setting forth her title, her claim as to the width of the street in question, and the action of the City in including her property as a part of the street and in contracting for the street improvement upon that basis, that the City was thereby attempting to take and appropriate the property of plaintiff without compensation, and to take and appropriate and use same and deprive the said plaintiff of the permanent use

thereof without due process of law, or any process of law and in violation of the rights of plaintiff as guaranteed her under the Constitution of the United States, and particularly under amendments Five and Fourteen thereof, which plaintiff here and now pleads and relies on for her protection against the wrongs and threatened wrongs of the defendant City in the proposed taking of her property as hereinbefore described."

The Court reversed the decrees saying:

"We are of the opinion that the allegations of the bills of complaint that the City acting under color of state authority was violating the asserted private right secured by the Federal Constitution, presented a substantial federal question, and that it was error of the District Court to refuse jurisdiction."

The case of *Cuyahoga River Power Company v. City of Akron*, 240 U.S. 462, 36 Sup. Ct. 402, 60 L. Ed. 743 was an appeal from the District Court of the United States for the Northern District of Ohio. The facts are presented in the very brief opinion of the Court delivered by Justice Holmes, which plaintiff quotes *in toto* as follows:

"This is a bill in equity brought by an Ohio corporation against a City of Ohio to prevent the latter from appropriating the waters of the Cuyahoga River and its tributaries above a certain point. It alleges that the plaintiff was incorporated under the laws of Ohio for the purpose of generating hydro-electric power by means of dams

and canals upon the said River, and of disposing of the same; that it has adopted surveys, maps, plans and profiles to that end, has entered upon, located and defined the property rights required, has instituted condemnation proceedings to acquire a part at least of such property, has sold bonds and spent large sums and has gained a paramount right to the water and necessary land. The bill also alleges that the City has passed an ordinance appropriating the water and directing its solicitor to take proceedings in Court for the assessment of the compensation to be paid. The District Court dismissed the bill for want of jurisdiction on the ground that it presented no Federal question, because if the plaintiff had any rights they could be appropriated only by paying for them in pursuance of the verdict of a jury and a judgment of a Court. It made the statutory certificate and the case comes here by direct appeal. 210 Fed. Rep. 524.

“It appears to us that sufficient attention was not paid to other allegations of the bill. After setting out various passages from the statutes and constitution of Ohio and concluding that the City has no constitutional power to take the property and franchises that the plaintiff is alleged to own or any property for a water supply, it alleges that the City does not intend to institute any proceedings against the plaintiff but intends to take its property and rights without compensation; that it is building a dam and has taken steps that will destroy the plaintiff’s rights; that it is insolvent; that the purpose of the ordinance and certain statutes referred to is to appropriate and destroy those

rights without compensation; that the defendant purports to be acting under the ordinance, and that in so acting it violates Article I, Sec. 10, and the Fourteenth Amendment of the Constitution of the United States. It is established that such action is to be regarded as the action of the State. *Raymond v. Chicago Union Traction Co.*, 207 U.S. 20. *Home Telephone and Telegraph Co. v. Los Angeles*, 227 U.S. 278. Whether the plaintiff has any rights that the City is bound to respect can be decided only by taking jurisdiction of the case; and the same is true of other questions raised. Therefore it will be necessary for the District Court to deal with the merits, and to that end the decree must be reversed."

The case of *Weaver v. Pennsylvania-Ohio Power & Light Co., et al.*, 10 F. 2d 759, was an appeal to the Circuit Court of Appeals for the Sixth Circuit from a decision by the District Court of the United States for the Eastern Division of the Southern District of Ohio. The complaint sought to enjoin the relocation of a portion of an inter-county highway which involved the taking of a strip across the plaintiff's land. The plaintiff contended that in such relocation the highway commissioners acted, not in the interest of public necessity, but for the benefit of private interests only, and so in abuse of the power of eminent domain, and in violation of the Fifth and Fourteenth Amendments to the Federal Constitution. The District Court rejected appellant's contention and dismissed the complaint. Upon appeal the question of the jurisdiction of the

District Court to entertain the action was raised and the Court said in that connection (page 760):

“As the bill charges collusion between the highway authorities and private interests to use the power of eminent domain in taking plaintiff's land for private purposes, and without public necessity therefor, the District Court had jurisdiction, on elementary principles, to entertain bill for injunction.”

In the case of *Portland Ry. Light & Power Co. v. City of Portland, et al.*, 181 Fed. 632, the plaintiff was a common carrier owning and operating a street railway system in the City of Portland, Oregon. In its complaint the plaintiff charged that the defendant City was attempting to condemn and appropriate a part of its right of way without any authority to do so. The defendant demurred to the bill on the ground that it appeared therefrom that the common council of the City had jurisdiction of the subject matter and of the parties, and proceeded regularly and in accordance with the provisions of the Charter in the matter of opening and widening certain streets involved and the appropriation of private property therefor, and therefore that complainant's remedy was by an appeal from the award of the appraisers, or by some direct proceeding to review the action of the common council, and not by an independent suit to enjoin the enforcement of the order for the opening of the street. The Court, however, issued a preliminary injunction and in its opinion said:

“This argument overlooks the pith of this controversy. The complainant’s position is not that the proceedings of the common council are irregular, but that it is an attempt to deprive it of its property without due process of law, in violation of the Fourteenth Amendment to the Federal Constitution, inasmuch as the City has no power under its Charter to take or appropriate its right of way or franchise for street purposes. If the order of the common council under its authority to open streets has deprived, or is about to deprive, the complainant of its property without due process of law, it is entitled to a remedy in this Court under Judiciary Act, March 3, 1887, c. 373, 24 Stat. 552 (U. S. Comp. St. 1901, p. 508), and the federal Constitution.”

Further on in its opinion the Court states as follows:

“The Fourteenth Amendment is a guaranty to every citizen, private or corporate, that he or it shall not be deprived of property by a state or any of its political subdivisions without due process of law, and the federal court has jurisdiction to enforce this guaranty. The taking of private property by a municipality without authority is clearly such a taking.”

CONCLUSION

As a conclusion from the foregoing, plaintiff submits that it is evident that the basic charge of his complaint is that the State of California has wronged plaintiff by taking his property for an unauthorized purpose and a purpose proscribed by the Constitution of the United States under circumstances corresponding with those in which the Courts have quite uniformly held such taking to be a taking without due process of law in violation of Sec. 1 of the Fourteenth Amendment to the Constitution of the United States and that therefore the court below erred in dismissing plaintiff's complaint for lack of jurisdiction.

It is therefore respectfully submitted that this Court should reverse the decision of the District Court and remand this case to said Court for trial.

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